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WEBSTER ON THE TERRITORIES.

The new field of legislation, which our acquisition of Puerto Rico and the Philippines has opened before us, makes the constitutional relation of Congress to the Territories of unusual importance. Respecting this question two views are held, differing from each other theoretically and practically. One is that the Territories are part of the United States, and under the Constitution; the other is that they are neither the one nor the other. The former view may be designated constitutionalism, the latter extra-constitutionalism. Of the extra-constitutionalists the great protagonist is Webster, though his authority is cited oftener than his argument. An examination of his argument will perhaps explain this fact.

In the United States Senate, during the session of 1848-49, a remarkable debate arose on a proposition to "extend" the Constitution over the territory recently acquired from Mexico, comprising the Territorial divisions of California, New Mexico, and Utah. The supporters of this proposition, holding that the Constitution sanctioned the introduction of slavery into such territory, assumed that Congress, by simply declaring the Constitution to be "extended" over the territory, would put the Constitution, so far as applicable, in full operation there, without the necessity of specific legislation for the purpose, thereby enabling slavery, as they hoped, successfully to run the gauntlet of a hostile majority in Congress, and effect a standing, if not a lodgment, in the new Territories.

The proposition called up Mr. Webster, from whose speech on the occasion I quote as it is given in Benton's "Examination of the Dred Scott Decision," a pamphlet zealously upholding Webster's position. He began by saying:

"It is of importance that we should seek to have clear ideas and correct notions of the question which this amendment of the member from Wisconsin has presented to us; and especially that we should seek to get some conception of what is meant by the proposition, in a law, to 'extend the Constitution of the United States to the Territories.' Why, sir, the thing is utterly impossible. All the legislation in the world, in this general form, could not accomplish it. There is no cause for the operation of the legislative power in such a manner as that."

Assuredly, there is not; and there is, what Mr. Webster apparently overlooked, as little cause for the operation of the legislative power for such a *purpose* as that. It is the office of legislation to *execute* the Constitution, not to *extend* it. The word *extend*, as we have just seen, was used insidiously in the Senate proposition, to import not the mere fact that the Constitution extended over the new Territories, but the execution of the Constitution within those Territories, so as to dispense with the further action of Congress in opening them to the admission of slave property; and Mr. Webster's qualifying phrases show that he inadvertently countenanced this artful confusion of language, for there is no "form" or "manner" in which legislation can extend the Constitution, unless *extend* be used in the sense of *execute*. In the circumstances, his submission in any degree to this "weak invention of the enemy" seems unaccountable.

The Constitution does not need to be extended. Though not self-executing, it is self-extending; it goes with the land of which it declares itself to be the supreme law, as the form goes with the substance. It is co-extensive with the political jurisdiction of the government that it creates, requiring, indeed, the intermediation of Congress to carry its powers into effect, but requiring or permitting no extraneous agency to extend it. As the organic law, the Constitution cannot be extended, in any proper sense of that term, save by amendment in accordance with its own provisions; and amendment is an act involving the special sanction of the sovereign, for the power to amend the Constitution is itself a delegated power—a power delegated to the people of three-fourths of the States respectively, by the people of all the States respectively, in whom alone resides the sovereignty in our political system. Three-fourths of the States may lawfully amend the Constitution, but only the whole number of the States could lawfully abolish it. All the States made the Constitution, and less than all the States cannot unmake or remake it, except by force. The Constitution

itself, in providing that it should be established when nine States ratified it, provided also that it should be established only between the States ratifying it, thus requiring virtually that the ratification should be unanimous. If Rhode Island, the last of the thirteen States that ratified the Constitution, had not ratified it, the Constitution would have been established nevertheless, but Rhode Island would not be to-day a member of our body politic.

Congress, therefore, cannot extend the Constitution in any mode. It of course can extend its own laws; and it was the linking of the Constitution with these in the proposition offered in the Senate—implying that the Constitution was extended over the Territories in the same sense as the enumerated laws, and would be equally operative, independently of special legislation—which constituted the undoubted subtlety of the scheme; wherein contemporaries professed to have no difficulty in tracing the "fine Italian hand" of Mr. Calhoun, who was in the Senate, and defended the proposition in debate.

The proposition was certainly fallacious, as well as insidious; but Mr. Webster, while rejecting rather than exposing the fallacy, committed another, not less transparent, and much more serious. The reason why Congress cannot "extend" the Constitution to the Territories he went on to explain as follows:

"What is the Constitution of the United States? Is not its very first principle, that all within its influence and comprehension shall be represented in the legislature which it establishes, with not only a right of debate and a right to vote in both Houses of Congress, but a right to partake in the choice of the President and Vice-President? And can we by by-law extend these rights or any of them to a Territory of the United States? Everybody will see that it is altogether impracticable."

This "principle," thus phrased or paraphrased, obviously implies nothing less than that the Territories are independent of the Constitution. Mr. Webster called it the "very first principle" of the Constitution, though the principle is not expressed in the Constitution, nor does the Constitution, in some of its important provisions, conform to the principle, as he travestied it. The Constitution does not grant the District of Columbia these rights or any one of them, but, on the contrary, denies them all to it, not temporarily but permanently. Is the District of Columbia not within the "influence and comprehension" of the Constitution? And do the sites of the forts, magazines, arsenals, dock-yards, and other needful buildings

of the United States, stand with the District of Columbia, and with the Territories, outside of the Constitution that expressly provides for the government of them all?

The right to be represented in Congress and the Electoral College is not a test of the nationality of a region, any more than the right to vote or hold office is a test of citizenship. The test of nationality in this relation, instead of being representation in the government, is subjection to its jurisdiction; and it will not be disputed that the Territories, as well as the District of Columbia, and the other places named, are under the jurisdiction of the government, or that the government, with its jurisdiction, is the creature of the Constitution. How, then, could it be seriously said that the Territories are not within the "influence and comprehension" of the Constitution?

Much acuteness has been wasted in this inquiry, it appears to me, in exploring the meaning of the term "United States." That term is the name of a body politic created by the Constitution, of which body politic the States united under the Constitution are the members, and the jurisdiction whereof is co-extensive with the territory, as conversely the territory is co-extensive with the jurisdiction, itself created and defined, I repeat, by the Constitution. All the territory subject to the United States, therefore, is subject to the Constitution of the United States: the States, the District of Columbia, the other places ceded by States to the United States, the Territories, organized and unorganized, are but divisions of the general territory under the jurisdiction of the United States, and, consequently, under the Constitution. The extent of the territory over which the United States exercises jurisdiction is a question of fact, to be determined as such; the question of the limitations of the jurisdiction is a question of law, to be determined by the Constitution that grants the jurisdiction.

The name of a body politic, whatever the name may be, can have nothing to do with the extent of the territory subject to the body politic, which depends on the vicissitudes of its affairs. As a body politic the United States supposes no territory, except as the necessary theatre of its operations—that is, in the vague sense in which territory necessarily enters into the conception of a nation. The extent of the territory of the United States is not a constitutional question, and cannot be answered by anything contained in the Constitution. One might as well look into the Constitution to find the name of the individual who is President at this time, or the

amount of the receipts and expenditures of the government for the last fiscal year. The simple existence of the government in operation implies territory of some extent, as it implies a President of some name, and receipts and expenditures of some amount: but not otherwise. Save in this sense, the term "United States" is not used at all in the Constitution to express extent of territory. As to the actual extent of the territory of the United States, it expresses or implies nothing. It is as silent respecting the extent of the territory as it is respecting the extent of the population. And this is equally true of the several States composing the body politic of the United States, all of which are themselves bodies politic.

It follows that with respect to the subject under discussion the term "United States" has no significance. It is simply the corporate name of the general government, throwing as much light, and as little, on the powers of Congress over the Territories, as the style "The People of the State of New York,"* for example, throws on the powers of the New York Legislature over the Adirondacks, or the Erie Canal, or any other subject of legislation in the Empire State. And this, whether the term "United States" is used to denote the body politic or the members of the body politic collectively, the difference between the two uses being that the former use conveys unity of idea, the latter plurality, as the term "Congress," though as unitary as that of "legislature," is used plurally in the Constitution, and till recently was used by good writers in the singular and the plural indifferently (it was used in the plural by Mr. Webster in one of the passages quoted below), though its plural use has nearly passed out of vogue, as the plural use of "United States" is gradually passing, under stress of the ever-increasing sense of unity in the national life. This I deem a wholesome sign, marking the progressive confirmation of our nationality, without indicating a tendency to political consolidation, which, undoubtedly, would be a symptom of national decay. But the bearing of the term in question on any point of constitutional construction is nil.

Whatever territory, then, is subject to the jurisdiction of the United States is within the United States, and under the Constitu-

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*Suppose the constitutional name of our Country, instead of being "United States of America," were "Republic of America," the Constitution in other respects remaining as it is. Would anybody in that case vex the name to tell him whether or not the Territories were a part of the Republic of America, and subject to its Constitution? The question answers itself, and at the same time exposes the fallacy of this *argumentum ad nominem*.

tion. How great or little it may be at a given period (it is now upwards of a hundred thousand square miles greater than it was a year ago) is a question of fact, as said before, to be settled by evidence, in lieu of a priori reasoning; but if we would know, what is infinitely more important, the powers of the United States over the territory subject to its jurisdiction, we must turn not to the name but to the Constitution of our country. A corporation, it is to be remembered, does not consist in the possessions of its members or in its own possessions, but in its franchises, which are set forth in its charter, not infolded in its name. Examining the name of a corporation, to ascertain the powers of the corporation, is attempting to make the tail wag the dog, if the expression may be allowed. The method, aside from its futility, involves a tremendous loss of mental leverage.

It will be said that the final clause of the thirteenth amendment implies that places subject to the jurisdiction of the United States are not of necessity within the United States. The clause does appear to imply this distinction, but the appearance is due to the fact that the term "United States," though used only a single time in the amendment, is used in two ways at once—to signify the members of the body politic, and at the same time the body politic itself—which is more than human language can bear without torsion. However, as the members of the body politic constitute the body politic, and "United States" as the name of the latter is put by metonymy for the former in the Constitution and in constitutional literature, the two modes of use, while confusing when mixed together in the same term at the same time, are equivalent to each other, and the final clause, referring to the one mode, and the penultimate clause, referring to the other, have the same denotation; so that the final clause, as the outcome of it all, is simply tautological—mere surplusage. It is possibly a literary more than a constitutional blunder. It is certainly a blunder of some sort.

As I may seem to impeach the competency of the authors of the thirteenth amendment, however, it is excusable in this connection to recall the historical fact that the same body which formulated the thirteenth amendment made the admission of the Southern States to their place in the Union conditional on their ratification of that amendment; not only requiring each of those States to exercise under dictation the sovereign power of a State as the price of its recognition as a State, but asserting the legal dissolution of the Union in the hour of its military triumph, and reconstructing it in

open disregard of the *equality of the States under the Constitution. One may be pardoned for declining to accept as a constitutional authority the body that perpetrated in the face of all the world this colossal and stupendous contradiction. So far as constitutional precedent is concerned, indeed, the reconstruction period might be treated by history, in my opinion, as Tom Marshall said the Tyler Administration should be treated, put in a parenthesis, "which," added Marshall, "Lindley Murray says should be read in a low tone of voice, and may be left out altogether without injury to the sense." This in passing.

The principle which Mr. Webster caricatured in the passage cited above, begging the reader's pardon for digressing, is the familiar principle of no taxation without representation. As a cardinal maxim of free government, it is, in its just import, substantially embodied in the Constitution, nor is the spirit of it violated by any of the provisions of that instrument, not excepting the provisions relating to the District of Columbia and the Territories. Against any real violation of this principle, the District and the Territories alike are guaranteed, through the common interest in their welfare cherished by the representatives of the whole nation, under whose immediate protection the Constitution places them. The Territories have an additional guarantee, moral and political, in being the wards of the nation, and heirs of Statehood—corporate minors; so that their conditional exclusion from participation in the govern-

* Apropos of the equality of the States, it has been asked what could be done, if Utah, disregarding the condition she accepted on her admission into the Union, should establish polygamy. The question is academic at present, and probably will remain so; but, should it become practical, the procedure in the case, it seems to me, would not be doubtful. The Supreme Court would be called on to decide, in the first place, whether or not the condition in question put Utah on a footing of inequality with the other States, none of which are subject to this condition, or to a condition of like import. If the court decided in the affirmative, declaring the condition void, Utah would have to be recognized in this matter as standing on her rights as a State, and the only remedy would be to prohibit polygamy, as slavery is prohibited, by constitutional amendment. If the court decided in the negative, declaring the condition valid, the decision in effect would extend the condition to the rest of the States, virtually making the prohibition of polygamy a part of the Constitution as it is; in which event the procedure would be the same as if the constitutional prohibition were express and formal, in place of constructive. The subject of punishment would not be the State (the general government does not act on a State), but the individual citizen of the State who, misled by the law of the State, should violate the law of the land. On this sound principle of procedure the rebellion was put down.

ment is no more a violation of the principle in hand, when stripped of hyperbole, than is the conditional exclusion of natural minors from participation in the suffrage. The rights of Statehood, in the one case, like the rights of manhood, in the other, are simply in abeyance.

In both cases, Mr. Webster's "very first principle" of the Constitution, accepting the extravagant form in which he stated it, is given its proper effect, and the rights that he declared it impracticable to extend to a Territory are in a broad sense actually extended under the Constitution to every Territory (and have been since the organization of the government), as soon as the Territory becomes qualified for admission as a State into the Union—comes of constitutional age; they are withheld only during its constitutional minority.

Thus the Territories, judged by a fair application even of Mr. Webster's exaggerated criterion, to say nothing of the express and the implied provisions of the Constitution authorizing Congress to govern them, and nothing of the constitutional prohibitions on Congress in the act of governing them, are subject to the Constitution at all points; as must needs be, we have seen, if they are subject to the United States, which has no jot of power not delegated by the Constitution. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States," the Constitution says, "are reserved to the States respectively or to the people." This goes indeed without saying. It is a corollary from the Constitution. As the powers of the government are all delegated powers, a power not delegated is necessarily reserved. Even a power prohibited to the States, if not delegated to the United States, is reserved to the people of all the States, respectively—the sovereign; subject to whose will the individual States hold all their powers. A sovereign not absolutely sovereign is not a sovereign.

In the debate on the Resolution to annex Hawaii, a distinguished Senator* (who made a very instructive speech on the wrong side) boldly reversed, in the face of the Constitution, this principle of reserved powers, for the purpose of showing that the right to acquire territory is not a constitutional right, express or implied, but an undelegated right of sovereignty—"an inherent, sovereign right," he styled it. "The right to acquire territory," said this Senator, " was not reserved, and therefore it is an inherent, sovereign right. Look the Constitution through, study its clauses,

* Senator Platt, of Connecticut.

and you will find in it no suggestion that there was any reservation of the right to acquire territory to the States or to the people." The Senator would seem to have spoken under the impression that the Constitution enumerates the reserved powers, and lumps the delegated powers. He could not have been fresh from his "study" of the tenth amendment. If the right to acquire territory was not reserved, as he says, and says truly, it must be delegated, for all the rights of the nation are either reserved or delegated; there are no middle rights. Every right of sovereignty, whether reserved or delegated, is inherent, but inherent in the sovereign, at whose will it may be revoked if delegated, or delegated if reserved. The rights of the sovereign as such are inalienable and indefeasible.

Accordingly, there is in our government, which consists exclusively of delegated powers, no such thing as an inherent power that is neither reserved nor delegated. A power not delegated is reserved; a power not reserved is delegated; and, while both powers are inherent in the nation, neither is inherent in the government, which is the nation's deputy, expressly authorized and expressly bound by the Constitution. In the complex community known as the United States, the sovereignty, as said above, is lodged in the people of all the States respectively, acting separately, and unanimously, as when they established the Constitution. It is to this collective sovereign that every department of the government, the government as a whole, and even the commanding group of States empowered to amend the Constitution, bow submissively; but which itself bows to no power on earth. It is only to this sovereign that undelegated powers belong, and not to the government which this sovereign has specially delegated to do its bidding. There is but one way in which the government of the United States can lawfully get possession of an undelegated power—by a supplementary delegation in an amendment to the Constitution; there is no store of powers, undelegated and unlimited, whereon the government may draw ad libitum or draw at all—no short cut to the reserved powers, except by usurpation. If this doctrine is not true, we might as well tear up our Constitution, and give the fragments to the wind; for in that case the government which the Constitution creates may at pleasure do it for us, and ultimately will, usurping one after another, under the guise of its own inherent power, the reserved powers of the sovereign, till it becomes itself the sovereign, and the people become its slaves.

It should be added that the Senator under notice dwelt at some length on the right of acquiring territory by discovery and occupa-

tion, as a right neither reserved nor delegated, yet possessed by the government as "an inherent, sovereign right." Concerning this view it will suffice to point out that the right of discovery and occupation exists by the law of nations, which is incorporated in the Constitution (written or unwritten) of every government, and is expressly made a part of our own Constitution by the eighth section of the first article. Hence, the right, so far as concerns our government, is a delegated right—as much so as the right to borrow money or to coin it. The notion of inherent rights in the government of the United States is a logical and political illusion. It is more. It is an invitation and a cloak to usurpation.

Let us return to Mr. Webster. Continuing his speech, he thus unfolded the implication of his "very first principle":

"The Constitution is extended over the United States, and over nothing else. It cannot be extended over anything, except over the old States, and the new States that shall come in hereafter, when they do come in. * * * It seems to be taken for granted that the right of trial by jury, the *habeas corpus*, and every principle designed to protect personal liberty, is extended by force of the Constitution itself over every new territory. * * * It is said that this must be so, else the right of *habeas corpus* would be lost. Undoubtedly these rights must be conferred by law, before they can be enjoyed in a Territory."

The fact that "these rights must be conferred by law, before they can be enjoyed in a Territory," Mr. Webster adduced as evidence that the Constitution does not extend over a Territory, though his language in the third sentence distinctly implies, in flat opposition to his express assertion in the preceding sentence, that the Constitution does extend over a Territory, denying only, what nobody affirms, that the Constitution by its own force carries its provisions into effect in a Territory. In trying to uphold his conclusion he appears to have upset his premises. The fact is that "these rights" must be both enforced and conferred by law, before they can be enjoyed in a Territory, or State either, or anywhere else. In a State, they are conferred by the State Constitution, and enforced by the State legislature; except within the exclusive jurisdiction of the federal government, where they are conferred by the federal Constitution, and enforced by the federal legislature. In a Territory, they are conferred as well as enforced by the federal legislature, as the supreme authority of the Territory, exercising on its behalf the powers of a State; except also within the exclusive jurisdiction of the federal government, where, as under the like jurisdiction in a

State, they are conferred directly by the federal Constitution, and enforced by the federal legislature as such, not as the legislature of the Territory. A frame of government cannot act by its own force anywhere. It needs everywhere the exercise of legislative power to put it into effect.

It is this necessity simply, and not the extra-constitutionality of the Territories, that Mr. Webster's citation proves. The evidence cited is true, but not relevant. The point which he undertook to make is not that legislation is necessary to execute a provision of the Constitution extending to a Territory or elsewhere,which is constitutional commonplace, but that the Constitution itself does not extend to a Territory. The Constitution unexecuted in a Territory, though extending over it (existent in it), is one thing; the Constition not only unexecuted in a Territory, but unextended over it (inexistent in it), is quite another thing. The latter thing is what Mr. Webster announced as his thesis; the former thing, that everybody admits, is what he proceeded to maintain. He stepped at once into the fallacy of irrelevant conclusion—a strange step, at any stage, for the Expounder of the Constitution, in the act of expounding it. Evidently (though that is not less strange) he was still, in a fitful way, confounding the extension of the Constitution with the execution of it. A subsequent turn of his mental kaleidoscope, however, while replying to Mr. Calhoun, brought him face to face with the question that he had engaged to argue; and he at last argued it. Subjoined is his argument—the argument on which, to do him justice, the partisans of extra-constitutionalism have since relied, and rely now:

"The honorable Senator from South Carolina, conversant with the subject as he must be, from his long experience in different branches of the government, must know that the Congress of the United States have established principles in regard to the Territories that are utterly repugnant to the Constitution. The Constitution of the United States has provided for them an independent judiciary; for the judge of every court of the United States holds his office upon the tenure of good behavior. Will the gentleman say that, in any court established in the Territories, the judge holds his office in that way? He holds it for a term of years, and is removable at Executive discretion. How did we govern Louisiana before it was a State? Did the writ of *habeas corpus* exist in Louisiana during its Territorial existence? Or the right to trial by jury? Who ever heard of trial by jury there before the law creating the Territorial government gave the right to trial by jury? No one."

The reader will notice—passing by these verbally mixed and wholly irrelevant interrogatories, already answered by anticipation—that Mr. Webster, in opening his argument, affirmed of the Territories: "The Constitution of the United States has provided for them an independent judiciary." This affirmation is just; but, if the Constitution has provided for them an independent judiciary, how can that provision make or leave them independent of the Constitution? Does it not, contrariwise, assert unequivocally their subjection to the Constitution? And how can "principles," for whose establishment the Constitution has provided, be "utterly repugnant to the Constitution?" Having after much zigzagging touched at length his main argument, the first use he made of the contact was to surrender his case. But, for sake of the argument, we will return him his case.

The facts of the case are in substance as Mr. Webster stated them; so far as he stated them. The judiciary article of the Constitution, as modified by the amendments, requires among other things that the judges of the federal courts shall hold their offices during good behavior, and that in those courts the trial of specified suits at common law, and of all crimes, except in cases of impeachment, shall be by jury. These are facts, on the one hand; on the other hand, Congress, irrespective of the judiciary article of the Constitution, has established, with the sanction of the Supreme Court, and the general assent of the people, Territorial courts the judges of which hold their offices during a term of years, and in which trial by jury, in both civil and criminal cases, is in the discretion of Congress granted or withheld, partially or wholly. Such are the facts to which Mr. Webster referred. They prove, he argued, that the Constitution does not extend over the Territories; which, by consequence, are independent of the Constitution, and not a part of the United States.

The argument is on the face of it a fallacy; since it assumes, not only without evidence but in spite of proof, that if the judiciary article of the Constitution does not extend to the Territories no other provision of the Constitution does; whereas in the teeth of this assumption, inadmissible in itself, is the acknowledged power of Congress to govern the Territories implied in the power to acquire new territory, and the express power of Congress "to make all needful rules and regulations" respecting the territory belonging to the United States. This is not all. The fallacy takes other subject-matter, and goes deeper.

The argument assumes, in addition to the false assumption just

mentioned, that if the judiciary article of the Constitution does not extend to all classes of cases in the Territories, it does not extend to the Territories at all. But the judiciary article of the Constitution, according to its own terms, extends only to the classes of cases that it enumerates. It does not extend to all classes of cases either in the States or in the Territories. It in fact extends to precisely the same classes of cases in the Territories as in the States—that is, to all cases of federal cognizance in both, and to no case of purely local cognizance in either. The jurisdiction of the federal judiciary, like that of the federal government at large, is federal only. It does not deal with controversies entirely local. The argument presupposes that the government of the United States, so far at least as relates to its judicial power, is a consolidated republic, instead of a federal republic. It mistakes the genius of our institutions.

Excepting cases between citizens of the same State claiming lands under grants of different States, the Constitution, indeed, in no provision and no instance, directly contemplates the cognizance of disputes between citizens of the same local community, be it a Territory or a State. With respect to such disputes, which involve nearly every object of human concern, the local government, whether Territorial or State, is under the Constitution free to establish its own judiciary, subject only to its own supreme law (the will of Congress in the case of a Territorial government), without regard to the special conditions imposed on the federal judiciary. The people of the several States at the formation of the government, having already incorporated into their State Constitutions the time-honored guarantees of personal liberty, naturally demanded the incorporation of these into the federal Constitution, not as restrictions on themselves, but as security against the encroachments of a government at once supreme in authority and beyond their immediate control. Their demand was granted, partly before the adoption of the Constitution, partly after; with the simple effect of adding to the restraints on the federal government, without subtracting a tittle from the powers of the States.

The bill of rights, that guards the personal liberty of the people of a State from the encroachments of their own legislature, is to be looked for in their own Constitution, not in the federal Constitution, which guards them from the encroachments of the federal legislature only. The provisions constituting a virtual bill of rights in the federal Constitution have no application to a State (whether infant or adult), though every State has in its own Constitution (and

Congress enacts for every Territory) similar provisions of equal or greater efficacy, adopted without reference to the federal Constitution, many of them before that Constitution itself was adopted. It belongs to a State in our system to order its own domestic affairs in general. The Constitution leaves the people of the several States supreme especially in the field of personal liberty. Therein the people, having the power immediately in their own hands, are trusted to protect their own rights, in their own way. In that *sanctum sanctorum* of the political temple, where either liberty must live or bear no life, they do not need, and would not brook, exterior control. The federal provisions under consideration are intended neither to impeach the spirit nor to invade the authority of the people in this respect. Were it otherwise, the Constitution would not have been ratified, or formed. That the States exacted this injury and insult to themselves is inconceivable. What, if we consider it, could be less admissible than the notion that proud Commonwealths, such as Massachusetts, South Carolina, Virginia, New York, hesitated to ratify the Constitution—for a time refused to ratify it—because it contained no provision prohibiting them from infringing the right of their own people to keep and bear arms; no provision prohibiting them from violating the right of their own people to be secure against unreasonable searches and seizures; no provision prohibiting them from depriving their own people of life, liberty, or property, without due process of law; and so on? The truth (historical and logical) is that the ten amendments adopted on the proposal of the first Congress have no bearing on the States in their relations to their own people. Those amendments bear solely on the federal government in its relations to the people. They prohibit the federal government from infringing the right of the people of a State to keep and bear arms, and the rest, but place no prohibition on the State itself, which they leave as they found it, free to regulate the personal rights of its own people as it thinks fit, within the limits of a republican form of government. They are checks on federal power, not abridgments of State power—barriers which the States have erected against the federal government, instead of shackles which they have riveted on themselves.

The view of these amendments here expressed is established, in my judgment, by the origin of the amendments; the avowed purpose for which they were proposed; the avowed motive with which they were ratified; the spirit of the whole Constitution which they amended; and even the first word of the first amendment, which, as the amendments were proposed with reference to each other, as

well as to the general defect they were designed to remedy, may be reasonably construed as supplying the subject, and fixing the bearing, of the prohibitions of all the rest, as it expressly does of the prohibitions of the first. Besides, the whole series of amendments proposed at the first session of the first Congress consisted of twelve, two of which were rejected, but the operation of both of which, like that of the first, fifth,* sixth, and seventh amendments of the ten ratified, was restricted, expressly or impliedly, to the federal government; so that, out of the twelve amendments proposed by the first Congress at its first session, six referred by their own terms to the federal government only, throwing on those, who claim that the ten amendments adopted refer to the States in common with the federal government, the burden either of proving that the terms of one-half of the whole series did not mean what they expressed or implied, or of overcoming the presumption (not to mention more formidable presumptions) that the prohibitions of the other half, without internal signs, were intended to have the same sphere of operation as that indicated by the internal signs of the former half. I apprehend that neither is possible—neither nullifying the internal signs, nor rebutting the presumption they raise.

This view is opposed by nothing, I believe, except the mere applicability of the subject-matter of some of the amendments to the States, no less than to the federal government, which will hardly appear strange when it is remembered that the substance of all the amendments, and more substance to the same effect, had made part of the State Constitutions before the federal Constitution was thought of; and which at any rate, as just shown, is ruled by the presumption arising from the internal signs of the leading amendments. Authority, it is true, may be cited in opposition to the view; but authority, without reason, is nothing.

The attitude of the Territories and of the States towards the judiciary article of the Constitution, resuming the direct thread of my argument, is identical. So true is this that Congress, in the exercise of its power as the federal legislature, has divided the whole

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* The words in the fifth amendment, "except in cases arising in *the land or naval forces*, or in the militia, when *in actual service in time of war or public danger*," point unmistakably to the federal government as the exclusive subject of prohibition; as do the words in the sixth amendment, "trial by an impartial jury of *the State and District* wherein the crime shall have been committed;" and as do also in the seventh amendment the words, "no fact tried by a jury shall be otherwise re-examined *in any court of the United States*, than according to the rules of the common law."

country, States and Territories indistinguishably, into judicial districts, grouped into judicial circuits, without other geographical distinction, and without any political distinction, converting the Constitution, in the process of executing the judiciary article, into a palimpsest, as it were, from which State and Territorial lines are erased, to make room for judicial lines. The Territory of Alaska, for example, constitutes a judicial district, assigned to the ninth judicial circuit, which, besides the district of Alaska, consists of the districts of California, Oregon, and Nevada. And so with the other Territories. The majority of the States, it may be noted, are divided respectively into two or more judicial districts; and the President in his late annual message recommends that the Territory of Alaska, the most rudimentary of the Territories, shall be divided in like manner, in which event Pennsylvania and Alaska, next to the oldest State and the newest Territory, dropping equally their political divisions, will be equally resolved into a group of units of the judicial system. Moreover, the appellate jurisdiction of the Supreme Court extends to the judgments of Territorial courts, as well as to those of State courts, witness the Congressional act of 1891, and the case of Coquitlam v. the United States, lately decided by the Supreme Court, on an appeal under that act from the District Court of Alaska (the court of last resort in the Territory). For the administrative purposes of the federal judiciary, in short, the States and the Territories are one.

The Territories, therefore, are neither more nor less exempt from the judiciary article of the Constitution than the States are. Mr. Webster's argument, as usual in reasoning of this kind, proves too much. If it is valid, the States are not under the Constitution that unites them, or in the Union that they form.

In point of fact, the States are less under the Constitution than the Territories are; for the States, exercising their reserved powers, make their own Constitutions, while Congress, exercising the powers granted to it by the Constitution, makes all the laws (organic and otherwise) for the Territories, until it admits them as States into the Union. In our constitutional system a Territory is heir to the rights of a State. As a child, on attaining its majority, is entitled to the rights of manhood or womanhood, so under the Constitution a Territory, when qualified for self-government, is entitled to the rights of Statehood, which, during the Territorial condition, Congress holds in trust for the Territory, and exercises on its behalf, surrendering them intact on admitting it as a State. A Territory is constitutionally an infant State.

It is this organic relation between the Territory and the State, in connection with the function of Congress as the supreme authority of the Territory, fiducially speaking, which makes the Territorial judiciary, like the State judiciary, independent not of the Constitution, indeed, as Mr. Webster hastily inferred, but of the judiciary article of the Constitution, whose scope is exclusively federal. The argument, considering who made it, is an astounding misrepresentation of the facts. It is the more astounding, as the conclusion is a self-contradiction, that should at once have brought the search-light of reason on the process whereby it was reached. The constitution of a limited government, that should exclude from its provisions a part of the country under the political jurisdiction of the government, investing the government, as respects that part, with unlimited powers, would contradict itself, as well as the nature of sovereignty, one of whose properties is indivisibility. It would be not only a political monstrosity, but happily a political impossibility.

The key to the whole Territorial question, as I conceive, was supplied by the Opinion of the Supreme Court in the very case, as it happened, in which Mr. Webster employed professionally the argument that he revamped twenty years later, to meet the exigencies of the sudden debate in the Senate. In the American Insurance Company v. Canter, the court, referring to the Territories, and speaking by Chief Justice Marshall, said: "In legislating for them, Congress exercises the combined powers of the general and of a State government." The reason for this combination is not far to seek. It has already been suggested. The Constitution empowers Congress to govern the Territories, and eventually to admit them as States into the Union. These two provisions are virtually complementary of each other, the latter provision involving a definition of the powers conferred on Congress in the former.

As to this latter provision, it may be said, by the way, undue stress has been laid on the potential mode in the clause, "New States may be admitted by the Congress." *May* is here used not to grant a favor, but to impose a function in the exercise of which the public have the sole interest, and, hence, in accordance with a recognized rule of legal construction, has the value of *must;* it is not used permissively, but obligationally. "New States may be admitted" does not mean in legal contemplation, therefore, that new States, qualified for admission, may be admitted or excluded, in the arbitrary discretion of Congress; it has the same legal effect, on the contrary, as if it read, "New States, lawfully constituted

within the limits of the United States, and qualified for self-government, shall be admitted." Such appears to be the just theory of the clause; to which Congress in practice has invariably conformed, overdoing rather than underdoing its duty in the premises. The clause unquestionably makes Congress the judge of the fact of qualification, and to this extent grants it discretion; but not further. When a Territory presents the evidences of its title to admission, and Congress cannot reasonably or honestly deny their sufficiency, it is constitutionally bound to admit the Territory; its power under the Constitution is henceforward ministerial. It has no greater right, constitutional or moral, to refuse to admit a qualified Territory into the Union, than a testamentary guardian has to refuse to surrender his guardianship when his ward comes of age. Whilst the one is a crime against the legal rights of the individual citizen, the other is a crime against the political rights of a great community of citizens.

The extraordinary powers, to resume, with which the Constitution invests Congress, as the political guardian of the Territory, in addition to its ordinary powers as the federal legislature, are measured by the powers which it surrenders to a Territory on admitting it as a State—are the powers of a State, that is to say. The Supreme Court describes them, not quite accurately, I think, as the powers of a "State government;" they are strictly, it seems to me, the powers of the State itself—of the people behind the State government, who make that government, and constitute the State. This same combination of powers, it may be mentioned, Congress exercises in legislating for the District of Columbia, and for the other places over which it is expressly granted the power of exclusive legislation, acquiring State powers over those places as the legal successor of the States that ceded them.

It is to be observed, respecting this combination, that Congress, in legislating for the Territories, exercises the powers of the general government not in legislating for a particular Territory, but for the Territories as a class, or as the property of the government, or as belonging in common with the States to the tract of country under the jurisdiction of the government. When Congress, in exercising its constitutional powers over the Territories, comes to the boundary of an individual Territory, it drops its powers as the national legislature, and enters clothed with those of a State only. As the national legislature, it legislates for the nation, not for a State, a Territory, or a District. As the supreme lawmaker of a Territory, it makes laws for the Territory, not for the

nation, or any other body of people. Though Congress, no doubt, when exercising State powers in a Territory, may confer on the Territorial courts the jurisdiction of admiralty cases, and other cases of federal cognizance, it can do this only in cases in which the States may confer the same jurisdiction on their own courts—that is, in cases wherein the jurisdiction of the federal courts is concurrent, not exclusive. The remark of the Supreme Court in the Canter case, that a State court exercising admiralty jurisdiction must be established under the third article of the Constitution (the judiciary article), though a Territorial court exercising the like jurisdiction need not be, seems inconsistent not merely with the lawful scope of that article, but with what may be called by pre-eminence the *Canter dictum*, which immediately follows this remark in the decision. Curiously enough, the dictum, on a roundabout survey, appears not wholly to sanction the view which occasioned it, and which it was originally employed to justify. In the cases just mentioned, as previously intimated, an appeal lies from the judgments of the State or Territorial courts, through the inferior courts of the United States, to the Supreme Court; and, in regulating the exercise of this appellate jurisdiction, Congress resumes its primary character as the national legislature. But as the supreme authority of an individual Territory, Congress exercises the powers of a State, and no other powers.

It is these powers, no greater, no less, of which the Constitution makes Congress the depositary during the minority of a Territory, and which under the Constitution Congress delivers up to the Territory on admitting it as a State. In this development of the dual character of Congress into a rounded principle, complete in itself, and universal in its application within the spheres of exclusive legislation, various conflicting expressions of the Supreme Court, it may be affirmed, are reconciled with its dictum in the Canter case, and with each other. The principle, thus developed, fixes the status of the Territories in our political system, if I mistake not, with scientific precision.

It follows from this principle that whatever a State may do or may not do within the sphere of its jurisdiction Congress may do or may not do in a Territory. As a State may establish its own judiciary to suit itself, Congress may establish a Territorial judiciary to suit its own conception of fitness; and in doing so it acts under the Constitution, not outside of it. The Territorial judiciary and the federal judiciary, to be sure, are independent of each other, except that in cases of federal cognizance an appeal lies from the

former (exactly as it lies from the State tribunals) to the latter; but, though independent of each other, neither is independent of the Constitution, which provides for both.

The fundamental error of Mr. Webster's argument, as it appears to me, consists in his not recognizing the distinction, though placed under his eyes by the Supreme Court a score of years before, between Congress in its primary character as the federal legislature, and Congress in its secondary character as the supreme power of the Territories—the depositary of the rights of nascent States. Touch the argument with this distinction, ever so lightly, and the fabric of sophistry flies to pieces, like a Prince Rupert's drop.

If the authority of Congress over the Territories is derived from the Constitution, it may be asked, what limits does the Constitution impose on the authority? To begin with, all that Congress does in a Territory, if it would observe the letter and spirit of the Constitution, must be "needful," and must tend to qualify the Territory for Statehood, the constitutional destiny of every Territory. It of course must not infringe, directly or indirectly, any provision of the Constitution, express or implied. Specifically, the authority of Congress over the Territories, as combining the powers of the general government and of a State, is in reason limited by the constitutional prohibitions on both. That it is limited by the prohibitions on the general government, when Congress exercises the powers of the general government, will be conceded; but that it must on a fair construction be limited also by the prohibitions on the States, when Congress in legislating for a Territory exercises the powers of a State, appears not only from the fact that the powers exercised in thus legislating are State powers, uncombined with the powers of the general government, but from the fact that, if free in this case from the prohibitions on the States, the authority of Congress in a Territory would exceed the powers which Congress delivers to the Territory on its admission into the Union. The powers of the trustee in possession cannot be greater than the powers of the legal and beneficial owner when he comes into possession. The guardian can have no power to do for his ward what his ward can have no power to do for himself on coming of age.

If Congress, in the exercise of its power of exclusive legislation over a Territory, could on behalf of the Territory emit bills of credit, pass a law impairing the obligation of contracts, enter into an agreement with a foreign power, or do any of the other things prohibited to the States but not to the United States, the Territory, acting by its constitutional agent, would exercise greater powers

than it would have when admitted as a State—the inchoate State, in power and dignity, would surpass the complete or definitive State; which is contrary to reason. The abeyant rights of a Territory, which Congress holds as its guardian, and yields to it on admitting it into the Union, can rightfully neither go beyond nor fall short of the rights of the Territory when it becomes a State. If they did either, how could Congress, as their constitutional depositary, account for the excess or the deficiency? It would have to confess itself either a usurper or a defaulter.

The power of Congress over the Territories is thus not unlimited. There are in our government no unlimited powers. A limited government having unlimited powers is a contradiction in terms. Next to the power of amendment, the power least limited in our government is the treaty-making power; but the treaty-making power is far from being unlimited. It is limited by the fundamental principles of the government; by the form of the government; by the distribution of the powers of the government; and by express provisions of the Constitution. For example, a treaty would be void that undertook to dissolve the Union; to change the government into a monarchy; to vest the judicial power of the United States in Congress or the legislative power in the President; to amend the Constitution in any particular without regard to the mode of amendment prescribed by the instrument itself; to deprive a State, without its consent, of its equal suffrage in the Senate; or to establish slavery within the United States. A treaty is valid when made "under the authority of the United States," not otherwise; and "the authority of the United States" is derived from the Constitution, and cannot be invoked by violating it. In this republic, in fine, the ægis of the Constitution covers everything. No Territory of the United States, near or remote, can escape the Constitution; any more than a man can outrun his shadow. Our government is purely a government of law. Extra-constitutionality is unconstitutionality.

A seeming anomaly in practice may be thought to mar the theoretical symmetry of our system. What if an infant State, it may be said, prove permanently incapable of self-government? In that case, assuming the Territory to be a permanent possession, there would be no choice but to keep it permanently in the Territorial condition. The principle is that a Territory qualified for self-government is entitled to admission as a State. This principle holds good in all cases; though in cases conceivable, if not confronting us, the attempt fully to realize it might stretch

out to the crack of doom. But that is not the fault of the principle. Anyway, we must fight the course. There seems no alternative, as things now are. If we have been so unfortunate or unwise as to introduce into our national household a political incorrigible or set of political incorrigibles, we shall have to pay the penalty, by taking up "the white man's burden," and bearing it as we may in subordination to the Constitution, ready to fight it out on that line, in default of a better, if it takes all time. Meanwhile, we are not bound, morally or constitutionally, to shut our eyes to any fair chance of throwing off the burden, without injury to ourselves or to its contents. In the event of meeting with such a chance, or of bringing it to pass, the treaty-making power, exercised in negotiating a treaty of independence, or even of cession, might open the door of honorable relief from a situation become intolerable to us, without any countervailing benefit to the Old Man of the Sea lashed on our shoulders by treaty, and pinned to them by bayonets. This is a constitutional possibility. One other resource there is. Should we find it impracticable to manage our Territorial incorrigibles, commercially or politically, under the Constitution as it stands, and be willing to adapt our free institutions to barbarians sooner than relinquish the endeavor to adapt barbarians to them, we are at liberty to alter the Constitution in the mode it prescribes. But we are not at liberty, let us bear in mind, to alter it by usurpation. As for undelegated rights of sovereignty (what are called "inherent rights"), it is the chief object of this article to accentuate the fact that in a government of enumerated powers such rights can have no existence. Whatever we do, or refrain from doing, now or hereafter, it behooves us to remember that we owe our first duty to ourselves, including those institutions in which are enshrined our own hopes, and the hopes of mankind. The unfading counsel of Polonius is as apt for nations as for individuals:

> "This above all, To thine ownself be true;
> And it must follow, as the night the day,
> Thou canst not then be false to any man."

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